

Rubric for Final Exam 12-17-10

Rubric: Final Exam Torts Sparrow F 10 Facts adapted from Jupin v. Kask, 849 N.E.2d 829 (MA 2006)

Question 1 - Damages – 15 points

General - 7

- Pain and suffering - past and future - medical expert to help validate
- Loss of enjoyment of life or hedonic – inability for her to engage in activities she enjoyed - Woo and other relatives, friends or family
- Likely no loss of consortium – single, childless
- Likely need expert to show problems associated with addiction, e.g. pain of withdrawal

Special - 8

- Medical costs and related – e.g. physical therapy - through bills accrued- past and future
- Treatment for narcotics addiction - experts
- Loss of services - need to hire helpers while recovering from injuries
- Loss of wages – past and future (W2s, pay stubs)
- Loss of potential future earnings - having been fired from job
- Need expert to estimate potential future earnings

Punitive - unlikely because question is about negligence and questionable that any party was grossly negligent (Dan could be required to pay punitive for intentional act, but question asks about negligent acts)

Question 2: Two Main parties to be sued in negligence - 15 points

Will - owner of gun - 10 points

- Failed to use lock that would keep guns inaccessible
- Allowed son to have key to home
- No lock on door to basement
- Did not take other steps, such as setting an alarm that would prevent son from accessing guns, or alert him if did, when had knowledge of son's violent history
- Violated FR § 140 (g) - negligence per se - while gun kept in locked container, gun not rendered "inoperable by any person other than the owner" - meets 2 part test, FR is negligence per se jurisdiction.
- Risk/utility or Hand test: unreasonable not to take inexpensive steps to used covered screws on hasp to prevent potential fatal injury

The physician - 5 points

- Failed to get history when ample time available - 5 days in hospital
- Prescribed narcotics without having accurate history
- Failed to do appropriate follow up care that would reveal additive tendencies
- Failed to follow professional standard - may need to have an expert depending on jurisdiction

Question 3: Negligence claim against Sheila Kirk- 50 points

Duty - 8 points

- General duty to protect foreseeable victims from foreseeable harms.
- When person engaged in dangerous activity, such as having guns, then duty increases
- Generally not duty to third parties, unless foreseeable harm present such as when boyfriend's adult son has dangerous history, guns present in home, son (Dan) knows about guns and is interested in guns
- Foreseeable that Dan could open up unsecured cabinet and take gun
- Foreseeable that Dan - or someone - could injure someone with gun taken from Sheila's unsecured basement

Standard of care - 3 points

- Reasonable person owning home with partner who owns 30 guns and stores them in her home, who has partner with violent and mentally unstable adult son who has access to home, awareness of and interest in guns

Breach- 15 points - other actions also possible

- Failed to use lock on gun cabinet that would keep guns inaccessible
- Failed to change locks on door
- Allowed boyfriend's son to have key to home when knew violent
- Allowed boyfriend's son to come into home when not present (knowing that he was mentally unstable, interested in guns, violent, aware of guns in basement)

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- No lock on door to basement
- Did not take other steps, such as setting an alarm, storing in safe or gun vault, storing elsewhere - that would prevent Dan from accessing guns, or alert her if did, when had knowledge of Dan's violent history
- Risk/utility or Hand test: unreasonable not to take inexpensive steps to prevent potential fatal injury - quick, easy, and inexpensive alternative available (using different hasp with covered screws) that would prevent potential risk of fatal injury. While the potential for harm might be low in general for other members of the public, the probability that harm would occur is much higher here with Dan's history and profile - 10 years of mental health counseling, history of assault, criminal charges.
- Factual cause-** 5 points
 - But for Sheila's actions above showing breach, Dan would not have been able to get into the gun cabinet, take the gun, and use it to shoot at Woo, inflicting bullet wounds which led her to become addicted to narcotics.
- Proximate causation-** 15 points
 - Foreseeable that because guns not completely secure, someone, such as Dan, could get access to a gun.
 - Foreseeable that someone accessing a gun from Sheila's basement could use it to shoot and harm victim
 - Woo suffered foreseeable injuries - bullet wounds - that would result from having guns insufficiently secured in a basement cabinet
 - Foreseeable that once victim wounded, would be treated by physician who would commit malpractice, such as failure to take a history, prescribing narcotics and leading to drug addiction
 - Even though Dan is an intervening event, does not completely relieve Sheila of liability because Sheila knew of Dan's violent history and interest in guns, Dan knew of gun cabinet, had lived in Sheila's home, had key to her home.
- Harm** - 4 points
 - Because Sheila breached her duty of care to keep anyone from accessing the guns in her home, Dan took a gun from her basement and used it to shoot Woo, causing bullet wounds in her left thigh, right shoulder and neck.
 - Because of those injuries, Woo then suffered further injury by developing addiction to narcotics.

Question 4: Best Element of Negligence for Sheila's Defense- 20 points

- Sheila owed no duty to Woo - one of best arguments** - 15 points
 - Not the gun owner, no interest or understanding about guns - never handled guns, no knowledge about key/s to cabinet
 - No responsibility for constructing or maintaining cabinet - left to Will
 - Wanted as little as possible to do with guns and cabinet, no problems in 16 years with 30 guns in home
 - Consistent with general rule that people owe no duty to third parties
 - FR Stat. Ann §140(g) does not create a duty for Sheila- limited to "gun owner"
- Sheila did not proximately cause Woo's injuries - another good argument** - 15 points
 - Dan's intentional act was a superceding event causing the bullet wounds and subsequent narcotics addiction.
 - Dan intentionally shot Woo; intentional criminal acts generally considered unforeseeable and break causal chain.
 - If Dan had negligently harmed someone like Woo, then Sheila might have been found partially at fault and responsible, but he intentionally ran from Woo, then fired at her.
 - Similar arguments as with no duty, above - not foreseeable harm to Sheila given how little responsibility, knowledge, or engagement she had with guns or gun cabinet
 - FR Stat. Ann §140(g) focuses on "gun owner" not those who may be living with those who own guns or who allow others to keep them on their premises
 - 16 years without problems; unforeseeable that cabinet would be broken into, gun taken and used to shoot Woo
- Identify why best argument, e.g. for duty:** - 5 points
 - E.g. Because judge would decide as a matter of law- more definite than leaving decision to the jury, and would save Sheila cost of going to trial. Similar arguments for duty as proximate cause, but finding no duty as a matter of law would cut off liability earlier.
 - Clear, precise and well organized response